In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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Subject Index

Table of Authorities Cited

Statutes

Texts

Miscellaneous

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A. RESPONDENT'S OPERATIONS ARE THOSE OF A COMMON CARRIER BY RAILROAD.

That Pacific Fruit Express issues no bills of lading or publishes no tariffs is meaningless in an inquiry addressed to respondent's status under the Federal Employers' Liability Act. In *United States v. California,* 297 U.S. 175 (1936), this Court determined that a terminal railroad was a common carrier by railroad engaged in interstate commerce, notwith-

standing the fact that it issued no bills of lading, was not a party to through rates, dealt only with the delivering or receiving carrier, and maintained no freight station. The absence of any reference to transportation of goods, issuance of bills of lading, or publication of tariffs, in the definition of a common carrier by railroad enunciated in *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 185 (1965), virtually erases these peripheral elements from consideration in applying the Employers' Liability Act.

The direct pronouncement of this Court in *Parden* must not be lightly dismissed since it specifies in unambiguous language the activities which include a railroad operation within the F.E.L.A. and the broad reach with which that Act is endowed through the words "common carrier by railroad." Respondent scorns the paramount importance of the *Parden* decision which lies both in this Court's most current exegesis of the clear Congressional desire to "cover all rail carriers that constitutionally could be covered" (377 U.S. at 187 n. 5) and the repeated insistence by this Court that the F.E.L.A. be applied uniformly. Since this Court has never addressed itself to the specific question posed by this Petition[1]—and moreover since the Employers' Liability Act sets no precise standards to determine what businesses are common

[1]Respondent imprudently urges upon this Court a suggestion that some significance should be attached to the denial of certiorari in *Moleton v. Union Pacific R.R. Co.*, 118 Utah 107, 219 P.2d 1080 (1950), *cert. den.* 340 U.S. 932 (1951). To the contrary, this Court has on innumerable occasions admonished the bar that a denial of certiorari must not be construed to be an expression on the merits. *See, e.g., Politis v. United States*, 364 U.S. 426, 433 (1960); *House*

carriers by railroad, such contemporary utterances as *Parden* are the only valid measure in determining the true nature and full significance of respondent's operations. Pacific Fruit Express makes no effort to propound any authority as more definitive than *Parden;* nor does respondent dispute that it engages in essentially the same activities used in that opinion to characterize the common carrier by railroad.

Respondent essentially attacks the *Parden* decision because the characterization of the terminal company as a common carrier by rail was so readily apparent that it was veritably unchallenged. Rather than giving comfort to respondent, however, the ease of classifying the business operations of the Alabama terminal company as those of a common carrier by railroad would suggest that P.F.E.—which possesses the same characteristics—should be determined to be such a carrier with equal dispatch. A realistic appraisal compels the observation that the general nature of the activities is the same, the hazards to be apprehended in both cases are the same, the uniquely railroad character of the enterprises is the same, and the importance of the enterprises within the railroad industry is the same. Thus the principles to be applied must be the same. The definitional language of *Parden* was an essential prerequisite to the application of the

v. Mayo, 324 U.S. 42, 48 (1944), and cases cited therein. Furthermore, the chief issue in *Moleton* was whether the contract between respondent and its owners violated 45 U.S.C. §55, prohibiting contracts to evade the F.E.L.A. Petitioner, having for the first time amassed and presented the evidence establishing that P.F.E. is a common carrier in its own right, has no need to urge the argument to which *Moleton,* and all the other cases involving respondent, were addressed.

F.E.L.A. in that case and is undeniably the best yardstick to take the measure of respondent herein.[2]

While not dispositive of this case as an isolated fact, respondent's operation of refrigerated vans in addition to railroad cars (R. 73-74) evidences an effort by respondent to offer broad transportation service to the public. Pacific Fruit Express distinctly does not restrict its business to the renting and servicing of refrigerator cars for operating railroads. Respondent's car distribution, diversion and passing operations (R. 74) establish the plain fact of *control* which respondent exerts over the interstate carriage of goods by rail, much if respondent itself were providing the motive power of each of the trains. P.F.E.'s claim that it is limited to merchandising merely an auxiliary or static service to the common carriage industry is thus negated. Respondent's own description of itself as a "railroad company" in various telephone directories or as "the *first family of perishable transportation*" (R. 70) adds to the total picture and invalidates the fictitious posture which

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[2]It is noteworthy that companies seeking a harsh and limited application of the F.E.L.A. in the past have invariably urged upon the courts the narrow and circuitous *obiter* of *Wells Fargo v. Taylor*, 254 U.S. 175, 187 (1920), upon which rested the decision in *Gaulden v. Southern Pacific*, 78 F.Supp. 657 (N.D. Calif. 1948), *aff'd* 174 F.2d 1022 (9th Cir. 1949). The crucial differences between *Wells Fargo* and *Parden* are several. While *Parden* undertook a detailed analysis of the significant indicia of railroad common carriers under the F.E.L.A., *Wells Fargo* offered only an obscure conclusion which has not been utilized by this Court for decades. Secondly, the very enterprises under consideration in *Wells Fargo* have since been held to be common carriers, escaping the F.E.L.A. only because of a lack of railroad equipment. (See discussion and cases cited at Petition p. 21 fn. 38.)

respondent seeks to assume before the courts.[3] It is manifestly the cumulative nature of this enterprise which must control in characterizing Pacific Fruit Express as a railroad company.

Solely by innuendo, respondent disparages its own publications which constitute the body of evidence offered by petitioner in the District Court. It is to be observed that these materials which, respondent asserts, form the "main basis for Petitioner's extravagant and inaccurate characterization of Respondent's business" (Brief for Respondent in Opposition, p. 3) were introduced without objection in the District Court, are undeniably authentic P.F.E. publications (a fact undisputed by respondent),[4] were used by respondent before the Court of Appeals to describe its

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[3]Against all of the indicia of railroad operations, respondent sets up only the affidavit of W. G. Cranmer of the Office of the Vice President and General Manager of P.F.E. From this conclusion-riddled statement, it would be necessary to distill extremely favorable inferences in order to reach the result demanded by Pacific Fruit Express. Aside from the fact that the statement is not reasonably susceptible of such liberal reading, the elementary principles governing summary judgment proceedings require that all inferences be drawn *against* the moving party. *Cochran v. United States*, 123 F.Supp. 362, 364 (D.C. Conn. 1954); Wright, Handbook of the Law of Federal Courts 388, §99 (1963); California Continuing Education of the Bar (Practice Handbook No. 15), Federal Civil Practice 380, §4.41 (1961).

[4]Advertisements—by railroad companies specifically—have been found to constitute admissions against interest to be treated the same as any other such declaration; such evidence is not rendered any less competent by a contention that it was only an advertisement to catch the credulous public. *Southern Pacific v. Godfrey*, 48 Tex.Civ.App. 616, 621, 107 S.W. 1135 (1908); *Southern Pacific v. Allen*, 48 Tex.Civ.App. 66, 106 S.W. 441 (1907); *cf. Lynch v. Bekins Van & Storage*, 31 Cal.App. 68, 159 Pac. 822 (1916); *Stringer v. Davis*, 35 Cal. 25 (1868).

own activities,[5] and effectively expose the insufficiency of the affidavit of W. G. Cranmer offered on behalf of respondent.[6] In the same vein, the telephone directory advertising of respondent also constitutes material and competent evidence of the nature of its operation.[7] Since the task of characterizing a business activity must by necessity hinge upon the relationship between the company in question and the public with which it engages, such evidence as may be furnished by

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[5]"The matter of car distribution services is explained more fully in the literature attached to the declaration of Leland P. Jarnigin (T.R. 69)." Respondent then proceeded to reprint verbatim a portion of R. 74. (Appellee's Brief p. 13.)

[6]One cannot but be intrigued by the fact that the mimeographed narrative describing respondent's operations (R. 71-75) concludes with the notation "Office of Vice President & General Manager/ San Francisco, California/March 1, 1963" and is therefore a publication of Mr. Cranmer's own office. (R. 34.) Since Mr. Cranmer executed substantially the same statement in *Aguirre v. Southern Pacific*, 232 Cal.App.2d 636, 43 Cal.Rptr. 73 (1964), as was introduced by respondent in the District Court herein, it appears that the Office of the Vice President and General Manager of Pacific Fruit Express was contemporaneously issuing conflicting documents.

[7]"We are of the opinion . . . that the fact that the regular issues of the directory of the telephone company are 'brought home to the public' is a matter of such common knowledge that there was no necessity for testimony with respect thereto." *Barron v. Board of Dental Examiners*, 44 Cal.App.2d 790, 795, 113 P.2d 247 (1941), upholding the administrative suspension of a dentist's license to practice because of advertising appearing in the telephone directory. The use of telephone directory listing as corroborating evidence is not novel. *See e.g. Arrow Aviation v. Moore*, 266 F.2d 488 (8th Cir. 1959); *Hood v. Bekins Van & Storage*, 178 Cal. 150, 172 Pac. 594 (1918). Moreover, since a federal court at an appellate level may notice judicially facts which are generally known or observable, *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (1946), the existence of certain words in books in general circulation and readily available for inspection by any member of the general public is properly brought to a court's attention.

commercial publications or advertising must logically be highly influential.[8]

Fundamentally, respondent has grounded its entire argument upon *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), *aff'd* 174 F.2d 1022 (9th Cir. 1949). In doing so, respondent has totally ignored the great factual differences between the Record in *Gaulden* (2555 Records of the U.S. Circuit Court of Appeals, Number 12062) and the Record before this Court.[9] More important, however, is the

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[8]Respondent's implied criticism of "the phone companies' available classifications" (Brief for Respondent in Opposition p. 7) is without merit. Respondent is not compelled to purchase any advertising in the classified telephone directory—especially if it does not endeavor to solicit business from the general public. Secondly, it is obvious that telephone companies must assign their classified headings in a manner consistent with commercial usage. Thirdly, and most elementary, there are alternatives available to respondent should it desire a different directory classification. For example, in the San Francisco classified telephone directory of September, 1967, at page 808 there exists presently a listing for "Railroad Car Leasing" which would appear far more consistent with the position that respondent urges upon this Court than the heading "Railroad Companies."

[9]A cursory comparison of the *Gaulden* file shows the Record herein to contain far more factual detail describing respondent's activities. In addition, contrary to respondent's claim, petitioner has not "abandoned" the argument that respondent's operations are significantly different from those detailed in *Gaulden*. The variances are obvious. For example, the *Gaulden* opinion described respondent in the following terms:

> The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested . . . . The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company . . . [which] transacts none of its protective service business directly with the shippers. 78 F. Supp. at 654.

In contrast to this, respondent uses the following language to explain its contact with the shipper:

> . . . if after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, *the shipper will call us on the telephone and request that we*

fact that respondent in resting upon *Gaulden* insists upon a narrow and restrictive construction of the Federal Employers' Liability Act, a statute which is to be given broad and remedial application.

Respondent has thus carefully avoided meeting the central issues raised by the Petition. It actually cannot be ascertained from respondent's brief whether it protests the classification "common carrier by railroad" or simply "common carrier," since respondent never addresses itself directly to the operative statutory language in the context of its commercial operations. Since P.F.E. unquestionably functions exclusively upon a highway of steel rails using equipment and appurtenances uniquely found in the railroad industry, Pacific Fruit Express cannot reasonably avoid the characterization "railroad." Moreover, both in law and in fact, P.F.E. is a common carrier; respondent neither disputes the evidence of its involvement with and control over the movement of commodities in interstate commerce nor proposes any decisional authority to suggest that it is other than an interstate carrier.

B. RESPONDENT MISCONSTRUES THE ENTIRE BODY OF FEDERAL LEGISLATION APPLICABLE TO THE RAILROAD INDUSTRY.

Congress has never altered the basic qualifying language of the Employers' Liability Act, "common

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"divert" the car from its originally billed destination to the new destination . . . . In handling some 285,000 carloads of perishables a year we are called upon *by shippers* to accomplish in the neighborhood of 170,000 diversions a year . . . . and *we keep shippers informed* when their shipments "pass" certain points . . . . (R. 74-75, italics added.)

carrier by railroad." At various times in amending the Act, Congress has added to the protection of railroad workingmen by modernizing the applicable federal substantive law[10] and clarifying the determination of whether or not a particular activity was in interstate commerce for F.E.L.A. purposes.[11] In view of the fact that the question of including refrigerator car operations under the F.E.L.A. first arose in *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651 (N.D. Calif. 1948), it is patently unreasonable to place any construction in this regard on any earlier action—or inaction—of Congress. At best, the doctrine of legislative acquiescence is only an "auxiliary tool for use in interpreting ambiguous statutory provisions . . ." *Jones v. Liberty Glass Co.,* 332 U.S. 524, 533 (1947). It should not properly be resorted to in a situation where Congress was confronted with neither judicial decision nor commercial tradition in which

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[10]E.g., abolishing the defense of assumption of the risk in F.E.L.A. cases. 53 Stat. 1404 (1939). It should not be forgotten that one of the most significant features of the Employers' Liability Act is its uniformity achieved through the required application of federal statutory and decisional law exclusively in substantive matters. *Jacobs v. Reading Co.,* 130 F.2d 612, 614 (3d Cir. 1942).

[11]53 Stat. 1404, the amendment of 1939. Respondent in referring to S. Rep. 661, 76th Cong., 1st Sess. 2 (1939) alleges that a "proposed amendment was defeated . . . ." (Brief for Respondent in Opposition p. 8.) In fact Senate Report 661, which was submitted by a single Senator, states only that the particular provision was "excluded from the substitute" bill since neither "necessity nor demand" for the specific inclusion of express, freight forwarding or sleeping-car companies had been found. Such an ambiguous report is of dubious value; committee reports are of value only where the meaning of a statute is doubtful and the report resolves, rather than creating, an ambiguity. *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932).

to acquiesce and where the paramount directive of Congress is undisputable.

The entire body of federal legislation regulating and defining the railroad industry must be understood as a whole. What is a railroad for one segment of this Congressional scheme should logically be a railroad for all other purposes under these acts. Congress in 1906, in amending one of the most comprehensive of legislative programs, provided a practical series of definitions for the terms applicable herein in the Interstate Commerce Act. 34 Stat. 584, 49 U.S.C. § 1. The Act applies, inter alia, to "common carriers engaged in the transportation of passengers or property wholly by railroad. . . ." *Id.* at § 1(a). All instrumentalities used in the transportation of persons or goods by rail are included within the term "railroad." *Id.* at § 1(3). "Transportation" as used in the Act specifically includes "refrigeration or icing," *id.*, activities which have traditionally been an essential factor in the common carriage of goods by rail. See *Alton & S. R. v. United States,* 49 F.2d 414 (N.D. Calif. 1931). The Interstate Commerce Act does not, on its face, purport to control the breadth of the F.E.L.A., but it is indeed important to observe that the language used is strikingly similar.

The Interstate Commerce Act has been linked directly to the Employers' Liability Act. The Railway Labor Act, 48 Stat. 1185, 45 U.S.C. §151 et seq., specifically adopts the same definition of common carrier as it found in the Interstate Commerce Act. With only occasional minor variation in phrasing,

the same broad concepts of common carrier, transportation, and railroad appear in every statute in Titles 45 and 49 defining or explaining those terms. Compare Railroad Retirement Act, 50 Stat. 307, 45 U.S.C. §228, or Railroad Unemployment Insurance Act, 44 Stat. 587, 45 U.S.C. §351, as but two examples.

The direct tie between the Interstate Commerce Act and the F.E.L.A. is found in the construction of the Federal Safety Appliance Act, 27 Stat. 531, 45 U.S.C. §1 et seq. The Safety Appliance Act has been held to be at least as broad in its application as the I.C.A. but was not limited by the requirement of the latter regarding "a continuous carriage or shipment." *Pacific Coast Ry. Co. v. United States,* 173 Fed. 448 (9th Cir. 1909). The Safety Appliance Act, on the other hand, is essentially *in pari materia* with the F.E.L.A., is viewed as a series of amendments to the F.E.L.A., and definitely expands the rights and protection given to persons employed in interstate rail commerce. *Urie v. Thompson,* 337 U.S. 163 (1949).

Petitioner does not dispute the fact that Congress has expressed an awareness of the fact that certain companies deal with refrigeration of rolling stock. Rather than mitigating against inclusion of respondent with the F.E.L.A., however, this fact has the opposite effect. As the court in *Bush v. Brooklyn Eastern District Terminal,* 218 N.Y.S. 516, 517, 218 App.Div. 782 (1926), reasoned in a terminal company action:

> We think it was necessary to decide that the defendant was a common carrier by railroad in order to apply to it the Hours of Service Act, as

> was done by the United States Supreme Court . . . . We think it could not be a common carrier within that act, and not be a common carrier within the provisions of the FELA.

Since respondent must comply with the Federal Safety Appliance Act, see *Pacific Fruit Express v. McColgan,* 67 Cal.App.2d 93, 97, 153 P.2d 607 (1944), there can be no logic in excluding application of the F.E.L.A. in view of respondent's extensive activities in the carriage of goods. Respondent places a construction upon Congressional activity in the area of railroad legislation which suggests a definite Congressional intent to create conflict and inconsistency in this field. In view of the fact that the Federal Employers' Liability Act does not exist in a vacuum but is a part of a comprehensive legislative program, it is highly unlikely that Congress intended to project ambiguity into this area.

Respondent seeks to deny petitioner the federal remedy which was designed to compensate for injuries resulting from the very hazards to which petitioner and his thousands of co-workers are exposed in their employment by Pacific Fruit Express Company. The fact that P.F.E. attempts to restrict its California employees to an administrative compensation program (workmen's compensation) has no effect on this case, *cf. Carroll v. Lanza,* 349 U.S. 408 (1955), is not properly evidence of the nature of respondent's activities, *cf. Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34 (1963), and does not accurately state P.F.E.'s exposure to damage actions in the various states in which it does

business.[12] Any necessary "readjustment" would involve no more than an alteration in the policies of liability insurance coverage purchased by respondent. As such respondent's reference to the temporary disability payments made to petitioner can only be intended to divert the attention of this Court from the central issue herein: can a company which *acts* as a common carrier by railroad, *characterizes* itself as a transporter of freight by railroad in interstate commerce, and *holds itself out* to the general public as a railroad company, logically immunize itself from the Federal Employers' Liability Act?

CONCLUSION

It is respectfully submitted that respondent has failed to offer any sound reasons against the issuance of a writ of certiorari in this case and that, for the reasons stated in the Petition, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 5, 1967.

Respectfully submitted,
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[12] In several jurisdictions, administrative compensation programs are optional and may be waived in favor of civil actions against an employer. *See*, for example, Ariz. Rev. Stats. §23-906, Kansas Stats. Anno. §44-543, Nebraska Rev. Stats. §48-112.